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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KANZA YAWILI, Defendant and Appellant.	C060930 (Super. Ct. Nos. 08F05914, 07M00831)

A jury found defendant Kanza Yawili guilty of making a criminal threat and found true he personally used a firearm while making the threat. The court sentenced him to prison for four years four months. Because of this conviction, the court revoked a prior grant of probation and sentenced him to a concurrent one-year term.

On appeal, defendant claims insufficient evidence of both the criminal threat and gun enhancement. Disagreeing, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Aaron Langston worked for Blackstone Communications, a company that installed "Direct TV." The equipment the company used was located at Public Storage in Sacramento County, where employees would pick up equipment and start their routes. Defendant's wife, Sarah Windham, was Langston's boss.

Windham's and Langston's relationship was friendly but not sexual. In April 2008, defendant walked in on Windham and Langston "joking around" and laughing at the Public Storage facility and misconstrued their behavior. Langston explained "nothing was going on," shook defendant's hand, and "thought everything was kosher."

On the morning of May 15, 2008, Langston and his roommate, Robert Taylor, who helped Langston out occasionally, went to Public Storage to begin work. They picked up materials from the storage facility, and as they were leaving to begin their route, they saw defendant and Windham yelling at each other. Langston became concerned because Windham previously told him that defendant had been violent with her. He decided to come back 5 or 10 minutes later and make sure everything was okay. When he did, Windham "looked roughed up," like she had "just . . . been in a . . . wrestling match." She had lumps on the back of her head, and she said defendant had "t[aken] her by the hair and then slammed her head up against the car a couple of times."

Defendant went to his car and removed what looked like a gun. Holding the gun at his side, he asked if any of them "had anymore to say to him." "[O]f course, nobody said anything."

Defendant then got in his car and drove away. Langston called 911.

Five or 10 minutes later, Windham got in her car to drive to Wal-Mart for baby formula. Five minutes later, Windham called Langston to report defendant was "right behind her, following her." Langston told her not to stop. Believing Windham was in danger, he headed to Wal-Mart in his truck.

At Wal-Mart's parking lot, Langston found neither Windham nor defendant. He drove back to Public Storage to wait for police.

Windham returned to Public Storage, and 10 minutes later, so did defendant. As he parked at the gate, police pulled up behind him. They first confirmed with Langston and Windham that defendant was the "'guy [who] the phone call was about.'" Police put defendant in the backseat of the patrol car because the dispatch call mentioned the possibility of a gun. Defendant said he had a "child's toy [gun]" in his car. In the rear of defendant's car, police found a fake plastic airsoft gun.

A police officer talked to Langston and Windham about what had happened. Windham said nothing had occurred. Langston said, "[L]ook at the security camera . . . [and] any of [your] questions would be answered." Langston was "[n]ot really" cooperative with law enforcement because Windham had told him not to mention the gun. The police decided "[n]othing [had] occurred" and left after 10 or 15 minutes.

After police left, defendant started "taunting" Langston, saying, "'Did you really believe that she'd ever have me arrested?'"

Defendant then went to the back of his car and opened the rear hatchback. He pulled out a second gun, and, while five feet away from Langston, "flashed it," saying, "'I guessed they missed one. I'll see you later. I'm going to fuck your girl.'" Langston told defendant, "'fuck you'" and "took off."

Langston described defendant's comments as a "threat[]." He understood them to mean defendant was "not happy about having the police called, and that he's going to find out where [Langston] live[s], or already knows where [he] live[s], and then come and get retribution." Langston was "[a]bsolutely" fearful "at this point." He was "[a]bsolutely" fearful defendant would make good on his threats because if defendant "ha[d] the nerve to [pull out a gun], [Langston] ha[d] no reason to think that he w[ould]'t do everything else he said."

Langston described the second gun as a semiautomatic Beretta with a rounded top, weighing about five pounds, that "[a]bsolutely" appeared real to him. Even though the first one may not have been, he believed the second one was.

When Langston left Public Storage, he did not go on his route, but went home and told his girlfriend what had happened. She became scared.

That day, Langston received about 10 voice mails from defendant -- all "threatening." In some of them, defendant recited Langston's address and Social Security number, asked him

for $500 "to pay for what [Langston had] d[one] with calling the police and having him put in the back of a police car," and said he was "'going to rape [Langston's] wife.'" Defendant also sent a text message to Langston's coworker, saying, "I'm on my way to his house." The coworker forwarded the message to Langston.

Langston and his girlfriend drove to the police station to file a report and get a restraining order. They then spent the night at a friend's house.

DISCUSSION

I

There Was Sufficient Evidence Defendant Made A Criminal Threat

Defendant contends there was insufficient evidence he made a criminal threat. He focuses on the incident at Public Storage with the real gun, claiming that although unanimity instructions were given, the prosecutor elected to base the charge on this incident. We agree regarding the prosecutor's election but disagree there was insufficient evidence of that incident.

The elements of making a criminal threat are: (1) the defendant "'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,'" (2) the defendant made the threat "'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,'" (3) the threat was "'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,'"

(4) the threat actually caused the person threatened "'to be in sustained fear for his or her own safety or for his or her immediate family's safety,'" and (5) the threatened person's fear was "'reasonabl[e]'" under the circumstances. (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Defendant claims there was insufficient evidence of these elements, and we should not take into account evidence of the voice mail messages because they were improperly admitted and his counsel was ineffective to the extent he failed to object. He argues his actions and statements to Langston were "simply emotional outbursts" that were not criminal and that were protected by his constitutional right to free speech.

Leaving aside the voice mail messages, there was sufficient evidence defendant made a criminal threat as that term is defined in the Penal Code, which was not protected speech. Defendant flashed a real gun, and while five feet from Langston, told him, "'I'll see you later. I'm going to fuck your girl.'" The flashing of the gun near Langston coupled with the statement "'I'll see *you* later'" (italics added) and "'I'm going to fuck your girl'" was a threat both to Langston that he would harm him with the gun and to his girlfriend that he would commit a sexual assault on her. That defendant intended his statements to be taken as a threat could be implied by defendant's use of a gun. Otherwise, there was little reason to take out the gun. The threat was "'*sufficiently* unequivocal, unconditional, immediate, and specific" to convey to Langston "'a gravity of purpose and immediate prospect of execution.'" (*People v. Hamlin* (2009) 170

Cal.App.4th 1412, 1433.) Langston had just called 911 on defendant because he feared for Windham, a woman to whom defendant was married and whom defendant suspected had acted inappropriately with Langston. Langston had reason to believe defendant knew where he lived because, although he had moved recently, Windham knew his address and Langston believed defendant had influence over her. The threat actually caused Langston to fear for his safety and for his girlfriend's safety. He had decided not to finish his route and instead went home to tell his girlfriend what had happened. They did not sleep in their own house that night. As Langston put it, he was "[a]bsolutely" fearful defendant would make good on his threats because if defendant "ha[d] the nerve to [pull out a gun], [Langston] ha[d] no reason to think that he w[ould]'t do everything else he said."[1] Finally, Langston's fear was reasonable. Defendant had just beaten up his wife, leaving her "roughed up" with "lumps on the back of her head."[2] Under these circumstances, it was reasonable to believe that defendant, who

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[1] At one point in his argument, defendant notes comments by the prosecutor and by the court at sentencing that Langston was not in fear at Public Storage. However, we are not concerned with the prosecutor's or trial court's view of the evidence. We are concerned with whether there was sufficient evidence presented to the jury from which it could make a finding of guilt as to all elements of the crime.

[2] This is a fair inference from the evidence, leaving aside Windham's statements about the altercation. Langston had seen Windham and defendant arguing and then observed Windham's disheveled look and lumps on the back of her head.

had just flashed a gun near Langston even after police had been on scene, was capable of using a gun to harm Langston and his girlfriend. On this record, there was sufficient evidence to support defendant's criminal threats conviction.

II

There Was Sufficient Evidence Of The Gun Enhancement

Defendant contends there was insufficient evidence of the gun enhancement, arguing it was "speculation to conclude [he] used a real gun during the second incident instead of another fake gun." According to defendant, "[b]ecause [he] kept [his] replica Glock in the back seat of his SUV . . . it was just as likely the second purported gun, the Beretta gun, that [he] retrieved only minutes later from the same vehicle was also a replica toy gun." Defendant's argument turns the standard of review on its head.

Here, viewed in a light most favorable *to the People*, as we must on a sufficiency of evidence review (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574), there was evidence from which the jury could have found that the gun in the second incident was real. Defendant took out what appeared to be a gun, "flashed it" five feet away from Langston, saying, "'I guessed they missed one. I'll see you later. I'm going to fuck your girl.'" According to Langston, the gun was a semiautomatic Beretta with a rounded top, weighing about five pounds that "[a]absolutely" appeared real to him.

This court has held the People can rely on the victim's perception the firearm was real, along with the defendant's

"'own words and conduct,'" to prove a firearm enhancement. (*People v. Monjares* (2008) 164 Cal.App.4th 1432, 1435-1437.) Here, defendant's conduct in using the gun to threaten Langston and his girlfriend and Langston's perception the firearm was real were sufficient to prove it was.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

HULL, Acting P. J.

BUTZ, J.